Clearwater case has far reaching consequences.

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The implications in light of the Clearwater case, has far reaching consequences for the boardroom and AGMs. Potentially the ruling represents a headache for company secretaries going forward, in gauging shareholder support, before tabling a resolution and ensuring its success. Russell Stenhouse reports.

The Clearwater ruling at the Appeal Court earlier this year, removed any time restrictions for advance proxy votes being received by a company for an AGM or any special resolutions being tabled.

ADMINISTRATIVE HEADACHE

The ruling has created a potential administrative headache for company secretaries and strategic nightmares for resolutions being tabled by the boardroom to investors. This is especially so, given that up to 90 per cent of votes cast at an AGM are by proxy. It has effectively, enabled shareholders to go right to the wire in casting their votes affirming their rights under section 58 of the companies act to appoint a proxy 'at any time'. A company cannot therefore under the ruling specify a proxy to be lodged on or before a particular set time and date. As a result, companies could potentially be unable to ascertain voting intentions, and resolution momentum, beforehand.

Whilst voting at AGMs has traditionally been dominated by one or two majority shareholders, ensuring resolutions are passed with requisite percentages without too much hinderance.

However, the climate is fast changing and as a result, voting intention is not so clear cut, especially so for listed companies, who do not have a majority shareholding. As such, voting has become more complex.

What this does mean is that voting intentions will be pushed to their limits in gaining meaningful insight into shareholder sentiment and support. As a result, companies will have to bear an extra burden in administrative and communication costs in testing sentiment, and chasing proxy votes beforehand. Potentially, the ruling by the Supreme Court of Appeal in light of the Clearwater case could potentially 'freak out' company secretaries in assessing shareholder behaviour and creating uncertainty beforehand at an AGM.

EFFECTIVE SHAREHOLDER ENGAGEMENT

However, the feared 'freak out' can be avoided if effective engagement with shareholders is executed prior to proxy voting, and uncertainty to some extent can be eliminated as a result. Shareholder communication and accountability, lies at the core of activity prior to proxy voting. Keeping shareholders abreast of company developments, key KPIs, strategy, market summaries with regards to growth, challenges and opportunities, will go a long way to keeping shareholders informed on company trends and eliminating an air of uncertainty around the proxy voting process.

At the crux of dealing with shareholder voting is a real need for companies to prepare themselves for the unexpected, given shareholders can now change their proxy at the last minute, not forgetting the recent rise in rattling shareholder activism, which in turn, can impact directly on the boardroom. However, companies can do more to quash such nervousness, by being more open and transparent in their shareholder communications strategy and scrutinising their, at times, diverse intent. Company secretaries can avoid the pitfalls by following the key guiding principles of the King report and by adopting good governance and effective compliance.

Estelle de Jager, Terbium Financial Services, said: "In light of Clearwater and proxy votes now having no time restrictions on when they can be presented, it's now imperative companies canvass for shareholder views and take such sentiment on board, before any resolutions are tabled for a shareholder vote.

"By testing out shareholder climate in advance of any resolutions being put forward at an AGM, companies can assess and address issues beforehand and thereby, avoid any embarrassment to a resolution not being passed and possible negative fallout at a resultant AGM," she added.

IDENTIFY SHAREHOLDERS

However, the Clearwater ruling which allows proxy votes to go to the wire, also presents another headache given timelines globally and assessing shareholders in overseas territories. Such a challenge, means companies now need also to be able to identify shareholders overseas and who they actually are, by embracing new technologies and using effective shareholder identification processes to benchmark and influence. Companies who ignore shareholder identification will suffer at their own peril, especially those who use institutional investments as part of their shareholder investment portfolio.

Morrow Sodali, a major global consultancy, leader in corporate governance and in the development of institutional investor relations, is an affiliate of Terbium in South Africa and firmly believes in bespoke communication for its clients.

“Not all companies are the same and don’t operate in the same environment, so it is essential communications to stakeholders and shareholders are tailored to meet the individual issues companies want to convey,” said Alvise Recchi, CEO, Morrow Sodali.

In short, he offers the following practical tips for proxy communication:

- Check the logistics of cross-border voting - regulatory deadlines, unbundling, ADR votes, other barriers to voting.
- Engagement with Proxy Advisors.
- Engagement with investors: selection, access to the right contact
- Prepare a direct communication plan with investors to neutralize the appearance of possible activist behaviour.
- Present alternatives to the Board before publication - measure in advance the impact of the decision, evaluate vulnerabilities, plan of action to maximize support.
- "Mobilize" the shareholder in a controlled manner.

USE TECHNOLOGY

Embracing technology is key to decisive, precise, influential and meaningful shareholder communication. Some companies have been slow to adapt to the fast changing pace of technology in support of their shareholder communications and as a result, have lost their edge on their industry competitors in ensuring influencer communications that deliver clear and desired results. Assessing shareholder sentiment is only possible when they have been identified and engaged with.

The fast moving environment in which communication has now evolved, has created instantaneous, 24/7 real time global reporting and has put increased pressure on companies to adapt to new technologies in conveying their key messages and operational efficiency to shareholders and key stakeholders.

Technological systems now need 24/7 mobile and seamless access and has to take into account local market requirements as the globalisation of technological shareholder databases continues to accelerate. Technological solutions therefore, must not only be capable of servicing the needs of multiple jurisdictions as globalisation gathers pace, but must also take into account languages, products, time-lines, structures and investor types to serve client, shareholder and stakeholder needs.

Technology should drive significant cost savings and provide a system that provides for companies to access data that is flexible, reliable and consistent. Above all, technology needs to be fit for purpose in dealing with the wave of regulatory changes and dealing with the collection, categorisation and maintenance of information and communication. Real time reporting using the web is clearly on the increase as it reflects a growing trend for investors requiring timely, transparent and comprehensive information including ESG risk management (Environmental, Social and Governance), which enables proactive and anticipative connectivity. As such, web reporting delivery applications have grown significantly in their importance and sophistication with full audit trails commonplace when administering multiple clients. Integrated technology is leading the way in enhancing reporting capabilities, coupled with the need for greater security, transparency and responsiveness.

Long gone are the days of assuming the guaranteed co-operation of shareholders and other stakeholders on all issues. Communication is everything.

INVESTOR PARTICIPATION

Terbium’s “Investor Participation Service” was launched to encourage better corporate governance and build a corporate culture of communication, values of recognition, shareholder inclusion and shareholders rights whilst making annual meetings more effective and efficient. It also takes a look at shareholder sentiment, pointing out the possible pit falls and negative reactions, as well as ways to assess them constructively. Through this service, shareholder participation and meeting management become more predictable and less confrontational. It also enhances corporate perceptions within the markets and displays responsible, accountable behaviour.

Terbium’s Estelle de Jager says “Striking the balance to what I describe as the ‘triangle of governance’ between board members, management and shareholders who may well have different objectives and expectations is no easy task, but managing such expectations is key, if all three components are going to be effective”.

“Engaging shareholder participation through clear communication is critical if companies are going to manage shareholder activism and apply good governance in the process,” she added.

New media and other communication methods make investor interaction far simpler and more frequent contact is easily attainable. Running in tandem with pro-active public relations and media campaigns, investor roadshows, marketing activity and investor briefings; stakeholder involvement should not be too difficult.

It is also important to continue face-to-face contact maintaining the personal touch, particularly with majority shareholders and frequent telephone calls across all shareholders should not be ruled out especially in times of big or controversial issues. Spelling out the company’s goals, on-going problems, trading difficulties and opportunities before the AGM can often alleviate problems and perhaps make negative shareholder activism a thing of the past.

+27 (0) 86 010 4191
info@terbium.global